Dr. Phillip Megdal, D.D.S., Inc. *and* International Chemical Workers Union, Local No. 766, AFL-CIO. Case 36-CA-3578

10 August 1983

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS JENKINS AND ZIMMERMAN

On 22 April 1981 Administrative Law Judge Frederick C. Herzog issued the initial attached Decision in this proceeding. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief. On 16 July 1982 the Board remanded this proceeding to the Administrative Law Judge for the purpose of preparing and issuing a Supplemental Decision setting forth his resolution of a specified credibility issue and containing findings of fact and conclusions of law consistent therewith. On 24 September 1982 the Administrative Law Judge issued the attached Supplemental Decision. Thereafter, the General Counsel filed exceptions and a supporting brief, and Respondent filed an answering brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision and Supplemental Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[1] and conclusions of the Administrative Law Judge but not to adopt his recommended Order.[2]

Ordinarily, we would impute a manager's or supervisor's knowledge of an employee's union activities to the employer. However, when it has been affirmatively established as a matter of fact that a supervisor who learned of union activities did not pass on the information to others, we, unlike our dissenting colleague, are unwilling to find that knowledge was conveyed as a matter of law. Member Jenkins asserts that it is unnecessary for us to consider the supervisor's denial that she divulged her knowledge of an employee's union activities to upper management because her testimony in this regard is self-serving. The issue with respect to such a denial, however, is whether or not it is credible in view of all of the circumstances of the case, not whether or not it can be characterized as self-serving. Once it has been established that a denial is credible, we cannot arbitrarily ignore it. Thus, we will not impute knowledge of union activities where the credited testimony establishes the contrary. See *Kimball Tire Co.*, 240 NLRB 343, 344 (1979).

The Administrative Law Judge found that Supervisors Pamela Benson and Ronnea Lynes were well acquainted with employee Carl Prestidge's union organizing efforts. Benson credibly testified, however, that she never mentioned anything about those activities to Respondent's owner, Dr. Phillip Megdal, until after Prestidge had been discharged. The Administrative Law Judge also credited Lynes, who testified that she never passed on any information to Megdal concerning Prestidge's union activities. Benson and Lynes were the only supervisors shown to have had knowledge of Prestidge's connection with the Union. Having credited both their denials that they discussed this subject with Megdal prior to Prestidge's discharge, the Administrative Law Judge could find no reasonable ground on which to impute their knowledge to Megdal.

Nor could the Administrative Law Judge find, in these circumstances, any basis for applying the "small plant doctrine" to infer that Megdal had knowledge of his employees' union activities.[3] He found nothing in the evidence concerning the manner in which the employees conducted their

[1] The General Counsel excepted to the Administrative Law Judge's findings in his original Decision, crediting the testimony of Supervisors Lynes and Benson that they did not divulge to Respondent's owner what they knew of employee Carl Prestidge's union activities. The Board remanded the proceeding to the Administrative Law Judge because it appeared, with respect to Lynes, that he had not considered all of the competent record evidence bearing on the issue of her credibility. Specifically, the Board directed the Administrative Law Judge to consider the effect on Lynes' credibility of employee Pegi Ford's testimony that Lynes informed her that Lynes had given the names of everyone who signed union authorization cards to Dr. Megdal. In considering the issue raised by the remand, the Administrative Law Judge explained why he deemed it improper to consider Ford's testimony in this regard in resolving Lynes' credibility. After reviewing that explanation we have concluded, for the reasons set forth by the Administrative Law Judge, that he correctly did not consider Ford's cited testimony in resolving Lynes' credibility.

The General Counsel has renewed his exceptions to the Administrative Law Judge's crediting of Lynes' and Benson's testimony. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In sec. III,D,1, third paragraph of his initial Decision, the Administrative Law Judge found that Dr. Megdal spoke to employee Prestidge on Christmas Day, 1979, and a few days later hired additional help. The record reveals, however, that this conversation took place on 27 December 1979, and that the assistant was hired that day or the next. We hereby correct the error.

[2] We will issue an Order in lieu of that recommended by the Administrative Law Judge to conform more closely with his findings of fact and conclusions of law.

[3] Similarly, the Administrative Law Judge rejected the General Counsel's contention that Megdal had to have known of his employees' union activities before 31 December 1979, the date he discharged Prestidge, because the Board's Regional Office mailed an election petition to his office on 26 December. This fact standing alone, he found, established that the possibility existed, but nothing more.

union activities to indicate that Megdal likely would have discovered them. In fact, he specifically found evidence to the contrary, noting that Prestidge and other employees sought to keep Megdal from learning of their union organizing activities, and also that the two potential "leaks," Benson and Lynes, remained "compartmentalized." The Administrative Law Judge also found credible Megdal's testimony that he first learned of Prestidge's union involvement after the discharge, when employee Jeff Gallego in effect accused him of firing Prestidge because of it. Accordingly, the Administrative Law Judge concluded, and we agree, that the General Counsel failed to establish that Megdal either had knowledge of Prestidge's union activities or that he could be charged with having had such knowledge prior to carrying out the discharge.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Dr. Phillip Megdal, D.D.S., Inc., Grants Pass, Oregon, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees with respect to the union activities of its employees.

(b) Threatening employees with discharge and/or loss of benefits for refusing to answer questions concerning their own or other employees' union activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Post at its Grants Pass, Oregon, facility copies of the attached notice marked "Appendix."[4] Copies of said notice, on forms provided by the Regional Director for Region 19, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director for Region 19, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[4] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER JENKINS, dissenting in part:

I join my colleagues in finding that Respondent violated Section 8(a)(1) of the Act by interrogating employee Pegi Ford concerning the union activities of her fellow employees and by threatening her with reprisals for failing to answer such questions. However, I cannot agree with my colleagues' finding that the discharge of employee Carl Prestidge was not unlawfully motivated, particularly in light of the Administrative Law Judge's refusal to make credibility findings in his Supplemental Decision as directed in our 16 July 1982 Order remanding the case for that purpose.

I am unable to agree with the majority's conclusion that *actual* knowledge by the highest corporate official of an individual's union activities is an absolute prerequisite to finding a violation of Section 8(a)(3). In light of the broad scope of Prestidge's organizing activities and the fact that at least two of Respondent's supervisors had direct knowledge of those activities, it was unnecessary for the Administrative Law Judge to reach the issue of whether the supervisors told Respondent's owner, Dr. Phillip Megdal, about Prestidge's union activities. Under the circumstances herein, I would impute to Respondent, as a matter of law, knowledge of Prestidge's union activities. *Pellegrini Bros. Wines*, 239 NLRB 1220 (1979); *Red Line Transfer & Storage Co.*, 204 NLRB 116 (1973); and *Warren Chateau Hall*, 214 NLRB 351 (1974).

I do not suggest that the majority has abandoned for all cases the general rule that knowledge of an employee's union activity by a supervisor will be imputed to an employer as a matter of law. I question only their failure to apply the principle under the facts in this case.

The record contains clear evidence that prior to the discharge at least two of Respondent's supervisors were well aware of Prestidge's union activity. In the face of this testimony it is unnecessary to consider the self-serving testimony of the supervisors, who were employed by Respondent at the time of the hearing, that they did not divulge their knowledge to Respondent's upper management. The majority's position creates an impossible burden on the General Counsel to establish a chain of knowledge of union activity all the way up Respondent's management hierarchy. Such a burden is unacceptable for reasons which are clearly evident in this case.

The Board has long held that, in the absence of direct knowledge of an employee's activities, knowledge may be inferred from circumstantial

evidence such as the timing of the discharge, the size of the employee complement, and the pretextual reasons asserted for a discharge. *Wiese Plow Welding Co.*, 123 NLRB 616 (1959). This is true even where, unlike the situation here, there is no evidence that a supervisor or low-level management official had knowledge of the union activity. I fail to understand why my colleagues refuse to apply this rule herein, but instead choose to rely on the self-serving testimony of (a) two supervisors that they did not relay their knowledge to higher management, and (b) another supervisor who claimed to be without knowledge of Prestidge's union activity.

As noted above, I am also unable to understand my colleagues' unreasoned acquiescence in the Administrative Law Judge's refusal to make certain credibility findings as directed specifically in our remand order. A brief review of the record evidence, the Administrative Law Judge's original Decision, and the Board's reasons for remanding the case show clearly the critical nature of the Administrative Law Judge's inaction. The central issue in this case is whether or not Respondent had knowledge of Prestidge's union activities prior to deciding to fire him. The record shows that employee Pegi Ford testified that Supervisor Ronnea Lynes had stated to her that (prior to Prestidge's discharge) she had given Respondent the names of all employees who had signed authorization cards. The Administrative Law Judge did not consider Lynes' statement as an admission against Respondent because at the time the testimony was given it was not known to the parties that Lynes was a statutory supervisor. Rather, Ford's testimony was allowed into the record for the purpose of showing the "context" of an employee meeting. Later in the hearing, counsel for the General Counsel called Lynes as a witness, and Lynes denied specifically that Dr. Megdal had asked her about the employees' union activities prior to the Prestidge discharge. It was not until the redirect examination of Lynes by counsel for the General Counsel that it became apparent that Lynes was a supervisor. The counsel for the General Counsel moved to amend the complaint to include Lynes as a supervisor and to allege that Lynes' attendance at two union meetings was violative of Section 8(a)(1) of the Act. In response to the General Counsel's motions, the Administrative Law Judge and Respondent's counsel commented as follows:

> JUDGE HERZOG: Yes. I am not going to tell you that this is not an important development in this case, while from my own standpoint I am much more concerned from the standpoint not of whether she violated the Act in attending those meetings. I do gather, I will tell you, frankly, Mr. Stratton, I, of course am bound by the law.
>
> I will look at the case law to see whether I have in fact, a *per se* violation here which I will be obliged to find as a result of her testimony about her activities.
>
> It is also my sense of the prior testimony of all witnesses in this case that she wasn't looked upon and viewed by other people in clearly an employee status as one among their ranks. There is still in my mind, even after hearing her testimony some question as to whether or not she was, in fact a supervisor or was simply a lead woman. *I would hope that the parties would address that question in their briefs because a great deal flows from it. One of the things that flows from it, quite obviously, is the entirely new light in which the question of employer knowledge of Carl Prestidge's union activities might be viewed if, in fact, it were found that she did possess supervisory authority during a time when critical events were taking place back in December.* [Emphasis supplied.]
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> RESPONDENT'S COUNSEL: I might point out that we have never denied that one of the supervisors named in the complaint, Ms. Pamela Benson, knew in December of '79 prior to Mr. Prestidge's termination of the union activities.
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> JUDGE HERZOG: I understand that. As I said yesterday, I believe it is a question which demands briefing, whether or not an employer may, if it is possible for an employer to, in effect insulate itself from the knowledge that comes into the heads of these supervisors, say the person that took action in this case who is alleged to violate the Act was never informed by that lower level supervisor.
>
> It is the question of whether that defense is available to the employer, I think, requires briefing and some good research.

In his original Decision, the Administrative Law Judge found that there was no proof that Dr. Megdal was aware of the employees' union activities prior to deciding to fire Prestidge. In connection with this finding, the Administrative Law Judge credited Lynes' denial of passing on information to Dr. Megdal, noting specifically the absence of evidence to contradict Lynes' testimony. However, if Ford's testimony had been admitted into evidence and considered by the Administrative Law Judge as an admission, as it clearly should have been, there would have been a direct conflict

between her testimony and Lynes.[5] the significance of Ford's conflicting testimony is heightened by the fact that the Administrative Law Judge found Ford to be fully credible, noting at one point in his original Decision that he was "favorably impressed with Ford's testimonial demeanor" and that Ford seemed "straightforward and candid."

In recognition of this direct conflict between Ford's and Lynes' testimony, the Board on 16 July 1982 remanded the case to the Administrative Law Judge "for the purpose of reevaluating the evidence and *making a credibility resolution* concerning Lynes' testimony that she never told Dr. Megdal about the union activities she had observed." (Emphasis supplied.) The Board stated specifically that the Administrative Law Judge's insufficient credibility finding regarding Lynes was based in part on the absence of evidence to contradict her testimony. Further, the Board noted Ford's contradictory testimony and concluded that "*Ford's testimony on this point therefore stands in direct contrast to that of Lynes.*" (Emphasis supplied.)

On 24 September 1982 the Administrative Law Judge issued a Supplemental Decision in which he found, *inter alia*, that there is "no competent evidence in this record by which Ford may be held to have contradicted Lynes' denial." In reaching this conclusion, the Administrative Law Judge noted that Ford's testimony had been admitted into evidence for a limited purpose, and the counsel for the General Counsel had failed to request that the prior evidentiary ruling limiting the use of the testimony be reconsidered or reversed following the discovery that Lynes was a supervisor. Thus, the Administrative Law Judge merely reaffirmed the original findings and conclusions without making the requisite credibility findings which the Board directed in its remand order. Not surprisingly, the Administrative Law Judge failed completely to discuss the significance of his comment set forth above regarding the impact of Lynes' newly discovered supervisory status on the question of Respondent's knowledge of Prestidge's union activities. To hold, as does the Administrative Law Judge, that Ford's testimony about Lynes cannot be used as an admission against Respondent merely because the General Counsel did not recall Ford or Lynes to the witness stand or expressly ask that Ford's testimony be considered as an admission ignores completely the above-cited comments of the Administrative Law Judge. I believe that the Administrative Law Judge's correct statement that "a great deal flows from it" (Lynes' supervisory status), and his further acknowledgement that the question of the Employer's knowledge of Prestidge's union activities might be viewed in an "entirely new light" could have reasonably led the General Counsel to believe that it was unnecessary to request specifically a change in the prior ruling regarding the scope of Ford's testimony.

Despite my colleague's statement on remand that the Administrative Law Judge "failed to consider all the relevant evidence bearing on the critical question of Lynes' credibility," they are now willing, for reasons unclear to me, to accept the Administrative Law Judge's evidentiary findings and to decide the case without the benefit of the credibility findings which were found to be lacking in the original Decision. The majority's unsupported reversal of position on this issue in order to avoid having to reconcile the direct conflict between Ford and Lynes is not only unfair to the parties, but once again prevents the Board from deciding the case on the basis of a complete record. I cannot join in this type of decisionmaking.

Under all the circumstances, and in view of the Administrative Law Judge's refusal to follow our directions and to make the required credibility findings, I would impute knowledge of Prestidge's union activities to Respondent as a matter of law. At the very least, this case should be remanded to the Administrative Law Judge with directions to reopen the record if necessary and to make a credibility finding with respect to the conflict between Ford and Lynes. I believe that anything short of this would be a denial of fundamental fairness.

Further, even without a resolution of the conflict between Ford and Lynes, I an unconvinced that Respondent discharged Prestidge for economic reasons. I believe that Respondent's apparent concern about Prestidge's production level was merely a pretext to disguise the true reasons behind its decision to rid itself quickly of the Union's chief organizer.

While the record is full of Megdal's self-serving statements relating to his concern about the clinic's income and production levels, the record is conspicuously devoid of any concrete evidence showing Prestidge's actual December 1979 production level or the economic impact of Prestidge's production. In its Decision, the majority overlooks this significant absence of evidence and adopts the fac-

[5] Similarly, the Administrative Law Judge's credibility finding as to Supervisor Benson is suspect in light of the improper limitation of Ford's testimony. The Administrative Law Judge concluded that Benson's testimony was equivocal and implausible on certain key issues, and seemingly for this reason failed to credit Benson in connection with her unlawful interrogation of Ford. However, Benson was credited with respect to the Prestidge discharge apparently for a lack of evidence to contradict her testimony. In light of the Administrative Law Judge's previous decision not to credit Benson, I am convinced that, had Ford's testimony been considered, the Administrative Law Judge would have not relied on Benson's testimony to show that Megdal was without knowledge of Prestidge's union activity.

tually unsupported conclusions of the Administrative Law Judge.

The Administrative Law Judge concludes that Megdal's overriding concern about Prestidge's production level caused Megdal to discharge Prestidge on 31 December. However, according to the record, at the time of Prestidge's discharge, Megdal, at best, did not know the level of Prestidge's current production and, at worst, knew that Prestidge's production recently had significantly increased. The record shows that, around 1 December, Supervisor Orr and Prestidge agreed that Prestidge would maintain a daily record of his work in order to monitor his level of production. Supervisor Lynes was to verify each daily entry. During a conference on Saturday, 29 December, Orr informed Megdal that Prestidge's production had significantly increased during December, and tried to talk Megdal out of terminating Prestidge. However, during the discharge interview on 31 December, Megdal testified that he called his Los Angeles office to check the computerized records of Prestidge's production, and that information was available relating to Prestidge's November and December production levels.

The majority, in adopting the Administrative Law Judge's findings, reasons that Megdal's call to Los Angeles immediately before discharging Prestidge proves that Megdal was concerned about Prestidge's production level. My colleagues' conclusion, although superficially persuasive, ignores the weight of all the evidence. During the 31 December discharge meeting, Megdal stated that Prestidge's production was not adequate and, without warning, immediately discharged him. Prestidge protested, stating that his production had increased in December and asked if Megdal had seen his daily work record for the month of December. Faced with Megdal's denial of knowledge of the whereabouts or contents of the record, which had "mysteriously" disappeared from Prestidge's work area, Prestidge asked Megdal to verify his increased production via Supervisors Orr or Lynes. Again, Megdal refused Prestidge's request; however, he did call Los Angeles to check computer records of Prestidge's production. There is an unresolved conflict in the record as to the nature of the information Megdal received from the computer. While Prestidge testified that Megdal was unable to obtain information about his December output, Megdal testified that such information was available. I cannot agree with the majority's failure to address this central conflict and the significance of Megdal's other actions. My colleagues simply ignore Respondent's failure to explain why Megdal refused to consult with Supervisor Lynes about Prestidge's production; why Megdal chose to disregard Orr's report that Prestidge's output had significantly increased in December; why the whereabouts of Prestidge's daily work record was of so little concern to Megdal; or why Megdal discharged Prestidge before consulting the computer records of his production. The majority discounts entirely Respondent's failure to produce the computer records purportedly relied on in discharging Prestidge, and seemingly disregards the fact that the record contains no real evidence of Prestidge's December production.

Respondent further stated that (1) low production levels cause special problems in the dental industry because a patient's original "impression" becomes inaccurate after a delay in processing, and (2) the clinic's income was declining. I note that the record lacks any evidence demonstrating a link between Prestidge's production level and problems with "impressions" or Respondent's income. I have no doubt that the Administrative Law Judge was correct in stating that, when discharging Prestidge, Megdal was concerned about certain economic considerations; however, I am convinced that Megdal's economic concerns were predicated on Prestidge's union activities, not his production level.

In light of the many unanswered questions raised by the absence of evidence to support the Administrative Law Judge's critical findings—the absence of warnings to Prestidge, the timing and abrupt nature of the discharge, the failure to produce the individual production records as well as the failure to produce any evidence of economic impact of Prestidge's work, the contradictory testimony of Respondent's witnesses and the failure of Megdal to deny that on 27 December he commended Prestidge for his work, Megdal's refusal to consult with Prestidge's supervisors, and the other reasons discussed herein—I conclude that the alleged reasons for the discharge were pretexts to disguise Respondent's reprisal against Prestidge for his union activities. I would, therefore, find that the discharge of Prestidge violated Section 8(a)(3) of the Act.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees with respect to their own or other employees' union activities.

WE WILL NOT threaten employees with discharge and/or loss of benefits for refusing to

answer questions concerning their own or other employees' union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them in Section 7 of the National Labor Relations Act, as amended.

DR. PHILLIP MEGDAL, D.D.S., INC.

DECISION

STATEMENT OF THE CASE

FREDERICK C. HERZOG, Administrative Law Judge: On January 4, 1980, the International Chemical Workers Union Local No. 766, AFL-CIO (hereinafter referred to as the Union), filed an unfair labor practice charge against Dr. Phillip Megdal, D.D.S., Inc. (hereinafter referred to as the Respondent), alleging violations of Section 8(a)(1) and (3) of the National Labor Relations Act, as amended, herein called the Act. The Union's charges were amended on January 15, 1980. On March 31, 1980, the Acting Regional Director for Region 19 of the National Labor Relations Board issued his complaint alleging violations of Section 8(a)(1) and (3) of the Act by the Respondent. Among the contentions advanced in the complaint were the claims that the Respondent discharged employee Carl Prestidge on December 31, 1979, because of his activities in support of the Union and that the Respondent discharged employee Pegi Ford on January 10, 1980, because she refused to attend an investigatory interview while unaccompanied. The Respondent's answer made certain factual admissions but, generally speaking, denied all wrongdoing. The issues thus presented were tried before me on August 12 and 13, 1980, at Grants Pass, Oregon.

In addition to other amendments to both the complaint and the answer at the hearing, the parties stipulated during the trial that those portions of the complaint dealing with the discharge of employee Ford had been settled during the course of the trial, and that no findings would be necessary with respect thereto to this decision.[1]

All parties at the hearing were given full opportunity to participate, to adduce relevant evidence, to examine and cross-examine witnesses, to argue orally, and to file briefs. Based on the record thus compiled, and the briefs of the General Counsel and the Respondent, I make the following findings.

[1] I approved the settlement agreement referred to at the conclusion of the trial. Since that date, counsel for the General Counsel filed a motion for partial dismissal of all portions of the complaint relating to the partial settlement entered into during the course of the trial. Having been advised that the Respondent has complied with all the provisions of the partial settlement agreement, I hereby grant the General Counsel's motion. Accordingly, this Decision shall not deal with the evidence presented by the General Counsel or by the Respondent in connection with the allegations pertaining to employee Ford's discharge except in instances where such evidence has bearing upon remaining allegations of the complaint.

FINDINGS OF FACT

I. THE BUSINESS OF THE RESPONDENT

The parties' pleadings, as amended at the hearing, demonstrate that the Respondent is an Oregon corporation engaged in the business of operating a dental clinic in Grants Pass, Oregon, where, during the 12 months preceding the issuance of the complaint, a representative period, it derived gross revenues in excess of $500,000. During that same 12-month period, the Respondent purchased, and caused to be transferred and delivered to its clinic, goods and materials valued in excess of $25,000, said goods being transported indirectly from States outside the State of Oregon.

Based on these admitted facts, I find and conclude contrary to the Respondent's contention that the Respondent is, and at all times material herein has been, an employer engaged in and affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Compare *Empire Dental Co.*, 211 NLRB 860 (1974), and cases cited therein.

II. THE UNION AS A LABOR ORGANIZATION

It is admitted, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Respondent, an Oregon corporation which operates a dental clinic at Grants Pass, Oregon, and which is owned by Phillip Megdal, D.D.S. (who also owns and operates a clinic in Klamath Falls, Oregon, plus two other clinics in California).

During the period from November 1979 through January 1980 the Respondent employed from two to four[2] dentists and two technicians at its Grants Pass clinic. One of the dentists, Dr. Robert Orr, supervised all professional employees of the clinic, including the two technicians. One technician made bridges and crowns, while the other made dentures. The technician who made bridges and crowns was Carl Prestidge, the alleged discriminatee herein.

The clinic also employed three office clerical employees and six dental assistants, all of whose general supervision was vested in Pamela Benson. Beginning in the fall of 1979 Benson was assisted in such supervision by Ronnea Lynes.[3]

[2] Benson, the Respondent's office manager, testified that the clinic employed three dentists before December 3, 1979. At that time, due to decline in the number of patients coming in, one dentist was laid off. Around the end of January or the beginning of February 1980, things "started getting caught up" and a third dentist was rehired. The record is unclear as to whether or not it was Dr. Megdal, himself, who was counted as the "fourth dentist."

[3] In the complaint Lynes was not alleged to have been a supervisory employee. However, during the course of the trial, the Respondent's own evidence clearly demonstrated that at all material times herein Lynes directed employees, granted time off, disciplined employees, and effectively participated in the hiring process. Thus, she was a supervisor at all material times herein.

The effect of this development upon the alleged unfair labor practices will be seen *infra*.

Prestidge began discussing the clinic's working conditions with a number of fellow employees in mid-November 1979, and even broached the subject of securing union representation with Benson on one occasion in early December 1979. As a result of these early and informal discussions among employees, Prestidge emerged as the leading advocate of unionism and as the initial and principal liaison between employees and the Union with which they were considering affiliation. For example, there were at least three organizational meetings conducted among employees at a restaurant in Grants Pass.[4] At these meetings the employees asked questions about unionism, which were answered by Prestidge. At Prestidge's request, most, if not all, of the employees eventually executed cards authorizing the Union to represent them in collective bargaining with the Respondent.

B. *The Interrogation of Ronnea Lynes*

The complaint alleges that Ronnea Lynes was interrogated on one occasion by Dr. Megdal about whether or not she signed a union authorization card. The evidence, however, demonstrates that there were two, rather than one, instances in which Dr. Megdal questioned Lynes about her or others' union activities. The first occurred around the end of the first week of January 1980. At that time Dr. Medgal asked her if she had signed a union authorization card. She replied that she had, causing him to groan, "Oh, lovely!" The second occurred about a week later, when Dr. Megdal inquired what was so terrible about working at the clinic that employees were caused to turn to the Union for help.

I have no doubt that these incidents occurred as Lynes testified. She testified candidly and without any apparent appreciation of the consequences of her testimony. Additionally, Dr. Megdal failed to deny her testimony during his own testimony.

However, this allegation must be found to lack merit in view of my further finding, set forth elsewhere herein, that Lynes was a supervisor within the meaning of the Act at the time of the events in question. As a consequence, and since it cannot be said that Dr. Megdal's questions were addressed to or overheard by any other "employee," I have concluded that the allegations made or contained in paragraph 6 of the complaint should be dismissed.

C. *The Interrogation and Threats to Pegi Ford*

The complaint alleges that Pegi Ford was interrogated by Pamela Benson on January 9, 1980, about the names of employees involved in union activities and about the activities themselves. The complaint further alleges that, upon her refusal to answer these questions, Ford was threatened with termination of her employment.

Ford testified as follows: On January 9, 1980, the day before she was fired, Benson inquired of her why employees felt like they should want to go union. Benson went on to warn Ford that Dr. Megdal was angry and that Ford could lose her bonus, her uniform allowance, and her raises. Benson then stated that Ford should think carefully about reaching an agreement with her which would enable her to keep her job. Benson then relieved Ford of duty for the remainder of the day, sending her home with the injunction to think it over and let her know her decision on the next day. The next day Benson approached Ford and said that they should talk. Benson asked Ford if she was going to stay. Ford responded that she was, that she could "handle it," and that she was willing to do a good job. About an hour later Ford was called into Dr. Megdal's office, beginning the events which caused Dr. Megdal to discharge her within a short time thereafter.

Benson testified as follows: She did, indeed, find that she had occasion to speak to Ford about her work on January 9, 1980, because she noticed that Ford's attitude toward work had undergone a big change for the worse during the 2 days preceding their conversations. She claimed that she saw Ford behaving coldly toward her, as well as fellow employees, and that some of Ford's attitude was being relayed to patients. So, she called Ford into an office and asked her if she was feeling well or was having problems at home. With this Ford responded with the claim that she was aware of a plan by Benson to fire her on the upcoming Friday, 2 days off.[5] Benson was taken aback by Ford's statement and said it was untrue. She asked Ford where she got such an idea. Ford rejoined that it did not matter, that she was tired of all the back stabbing in the office, and that everyone there was a nervous wreck. Benson stated that she could sit and argue about her intentions to fire Ford but that she did not think it would do any good. Ford agreed. So, Benson went on to testify, she asked Ford what she could do to put the minds of the employees at rest. She said that she felt caught between her friendships with employees and her employment. Ford advised her to choose a side, and then suggested that Benson lay her off, rather than fire her, in order to allow Ford to collect unemployment compensation. Benson declined and told

[4] Lynes attended two of these meetings, apparently under the good-faith, albeit mistaken, impression, shared by employees, that she was not a supervisor and that, as an employee, she qualified for membership and participation in the union activities. In light of the fact that Lynes' supervisory status was fully litigated at the trial, and the further fact that such evidence was first elicited by questions put to her by the Respondent's own counsel, I hereby grant counsel for the General Counsel's motion to amend the complaint during trial to allege the supervisory status of Lynes, as well as to allege the violation of Sec. 8(a)(1) of the Act by her attendance at and observation of employee meetings to discuss union activities. While the Board has pointed out that such activity by a member of management has an inherent tendency to impede employees in the exercise of their self-oranization rights, the Board has also pointed out that attendance by a supervisor at organizational meetings with the knowledge and consent of employees does not constitute surveillance. *Preiser Scientific, Inc.*, 158 NLRB 1375, 1383 (1966); *Computed Time Corp.*, 228 NLRB 1243, 1245 (1977).

Accordingly, since I find that the evidence, both direct and circumstantial, suggests strongly that Lyne's presence at employees' organizational meetings was with their knowledge and tacit approval, I further find that the Respondent did not violate the Act by virtue of her actions.

[5] Benson testified, in connection with speculation about Ford's reason for believing herself vulnerable to termination on January 11, 1980, that the clinic had "lost a doctor and . . . had too many girls." She also stated that the clinic had experienced a drop in work coming into the office. As a result, around January 9, 1980, Megdal talked to her about laying off one of the dental assistants. Evidently their discussions were not kept confidential.

Ford that her attitude would have to improve. Then, Benson further testified, she told Ford she "couldn't go into this union matter in detail" but she did ask Ford what the employees' major problems were. Ford responded that employees were concerned about their job security. Following further discussion, Ford became upset and announced her intent to leave, being unable to tolerate the situation longer. Benson told her to take the rest of the day off, calm down, and return to talk it over the next day. Benson specifically denied that she ever uttered the threats attributed to her by Ford.

As previously noted, the question of the Respondent's liability for the discharge of Ford on January 10, 1980, was settled by the parties during the course of the trial herein, and I shall make no findings with respect thereto. However, the settlement in no way addresses the issues presented by the alleged interrogation and threat.

The versions of the January 9, 1980, conversation offered by Ford and Benson differ in detail and emphasis. But even Benson admitted that she asked Ford to tell her what the employees' "major problems" were, as well as the broad outlines of the conversation itself. I also note that Benson's view of Ford's work underwent so pronounced a change that it can only be termed suspiciously extreme in its rapidity and depth, particularly when it is borne in mind that Ford was deemed a "real good" employee up until only 2 days before being called in for a conference. Even Benson admitted that all the employees were nervous during the first week of January 1980 because of the "union thing" and, one must presume, the firing of Prestidge on the previous Monday.

I was favorably impressed with Ford's testimonial demeanor. While obviously nervous, she seemed straightforward and candid in her responses. Benson's demeanor was also that of a person trying generally to be truthful, but I could not help noting that her concern over being "caught in the middle" apparently caused her to equivocate during some of her testimony. For example, when asked whether she had said anything to Ford like, "You are unhappy here. Why don't you quit?" or words to that effect, her response was merely a laconic, "I don't think so." I view this response as equivocal since it was concerned with one of the primary issues to be decided and, perforce, must have been one item which Benson had reflected upon at some length before the trial began. Thus, her inability to bring herself to testify more forcefully about this matter indicates that I am justified in regarding such testimony with skepticism.

Based on my observation of the demeanor of the witnesses, Ford and Benson, and the apparent implausibility of Benson's testimony that a mere 2-day display of "bad attitude" by Ford would have proven sufficiently provocative to cause Benson to call Ford in for a conference, I have determined that Ford's testimony possesses superior credibility. As a consequence, I must, in turn, conclude that Benson unlawfully interrogated Ford, much as she, seemingly unwittingly, admitted. However, I also conclude that the evidence fails to support the allegation made in paragraph 5(a) of the complaint, since even Ford's testimony advances no claim that Benson interrogated her about the names of those other employees who engaged in union activities. And finally, in light of my resolution of credibility, I find that Benson unlawfully threatened Ford with discharge and/or loss of benefits such as pay increases, bonuses, or uniform allowances.

D. *The Discharge of Carl Prestidge*

1. Facts

Prestidge was hired by Dr. Orr in March 1979 and began working in the clinic's laboratory as a ceramist. He initially experienced no problems with either his work or his relationship with his employer.

As time passed, however, Dr. Megdal, who visited the clinic occasionally, began to question Prestidge's productivity.[6] Dr. Megdal called this and other problems to the attention of Dr. Orr, in effect, calling Dr. Orr "on the carpet" for failing to check and investigate such problems himself. Dr. Orr thereafter, around the first of December 1979, talked with Prestidge about the decline in productivity. As a result of the discussion Dr. Orr and Prestidge agreed that Prestidge would thereafter maintain a daily record of his production. Moreover, Lynes was instructed to verify the accuracy of Prestidge's record each day, by checking the correctness of the numbers written thereon by Prestidge. Additionally, so Prestidge testified, he had two or more meetings with Dr. Megdal, himself, in November 1979; these meetings evidently dealt with the changes necessitated by the opening of a new clinic in a nearby town.

Notwithstanding these special efforts, the lagging work[7] in the lab was not caught up by late December 1979. When Dr. Megdal again came to the clinic on Christmas Day 1979 and talked with Prestidge, he agreed to hire additional help and did so a few days later, whether he did this at Prestidge's request, or for his own benefit (as, for example, a hedge against lost production if he should fire Prestidge), seems unclear. However, according to Prestidge's testimony, Dr. Megdal also took this occasion to commend him for his work.[8] and allowed him to make a phone call to hire the assistant for the laboratory, Jeff Gallego.

Then, again according to Prestidge, Dr. Megdal talked to him once more on Friday, December 28, the following day. They began a conversation in the lab and continued it in Dr. Megdal's office. Dr. Megdal sought to persuade Prestidge to do his work on a piece rate basis,

[6] A decline in the productivity of a technician would cause an obvious problem with a dental clinic's ability to submit bills to patients. But a less obvious problem would be caused by the fact that, if the lab were behind in its work to the point of being unable to complete bridges and crowns within approximately 1 week's time from whenever the patient's "impression" was taken, there was a danger that the original "impression" would no longer be accurate. If this occurred the entire process had to be repeated, since the patient's remaining natural teeth would "migrate" if left without support for a week or longer. In such instances the clinic would clearly lose both the good will of the patient and the cost of re-doing the original work of the impression and casting.

[7] For whatever reason, Prestidge's work was behind by about 70 to 80 units, or 2 to 3 weeks. This finding is based on an amalgam of the testimony herein, and does not appear to be seriously contested by the General Counsel. Instead, the General Counsel argues that Prestidge had no "quota," and, therefore, no schedule. I reject the argument, for it simply ignores the fact that an employer such as the Respondent has a right to expect reasonable diligence and productivity.

[8] Dr. Megdal failed to deny this when he testified.

rather than the salarly he had been getting. Prestidge refused. Dr. Megdal then became upset and walked out of the meeting. Prestidge returned to his own work.

Prestidge's next scheduled workday was Monday, December 31, 1979. He testified that he came to work as usual. But soon thereafter he noticed Dr. Megdal standing inside the door of the lab, watching him. Around 10 a.m. Dr. Megdal came to him and told him to see him before leaving. Thus, work ceased around 11:30 a.m., due to the upcoming holiday, and Prestidge went into Dr. Megdal's office around noon. He sat and awaited Dr. Megdal's arrival until 12:20 p.m.

When Dr. Megdal came in he seated himself behind his desk, and told Prestidge that his production was not adequate. Prestidge asked whether Dr. Megdal had "the list,"[9] by which he referred to the daily record he had kept since early December 1979. Prestidge claimed that the list would show that he had been producing an average of seven to eight units per day during the month of recordkeeping. Dr. Megdal, however, denied any knowledge of the whereabouts of the list, much less any knowledge of its contents. Prestidge asked Dr. Megdal if he was being fired. Dr. Megdal responded that he would call and check the computerized records of the clinic's production. When he did so the computer's operator was not able, so Prestidge testified, to retrieve data relating to the month of December 1979. However, Dr. Megdal was able to verify that production during the 28 days preceding Prestidge's keeping of the list averaged 5.7 units per day. Prestidge then told Dr. Megdal of time off he had taken in November and of problems he experienced which had necessitated many "remakes,"[10] which were not recorded in the computer's memory. He asked Dr. Megdal to check with Dr. Orr or with Lynes, to verify his claim regarding the production average in December. Dr. Megdal declined and simply asked Prestidge if he wanted his check mailed. Prestidge responded affirmatively and left.

At some point during the exit interview, set out above, Prestidge noted that Dr. Megdal had a pistol. He testified that Dr. Megdal held the pistol in his hand. However, neither man mentioned or questioned its presence or purpose during the course of their conversation. At the trial[11] Dr. Megdal explained its purpose as being a defense against Prestidge, a somewhat larger, and according to Dr. Megdal, reputedly violent man.

Dr. Megdal's version of the events leading to Prestidge's discharge differed somewhat from that of Prestidge. For example, Dr. Megdal denied that Prestidge ever mentioned the list to him during the exit interview. (It was true that Dr. Megdal knew of its existence, as he admitted that he had unsuccessfully searched for it after Dr. Orr told him about its existence during a conference he conducted with Dr. Orr on Saturday, December 29. Dr. Orr has initially claimed to Dr. Megdal during that conference that Prestidge had been producing ten units per day. Dr. Megdal searched for the list in order to check the accuracy of Orr's statement.) Additionally, Dr. Megdal testified that information concerning Prestidge's production for both November and December 1979 was available when he called his computer terminal in Los Angeles. Finally, Dr. Megdal claimed not to have had a pistol in his hand during the exit interview. Instead, so he testified, the pistol was kept out of sight, tucked beneath his leg as he sat talking to Prestidge. He further testified, though clearly inaccurately, that Prestidge had no opportunity to notice it during the interview. Dr. Megdal also asserted that he had the gun at the ready because "it was a real high energy day," and that Prestidge "had the look of being angry and, consequently, [Dr. Megdal] was afraid."

2. Discussion

To state the obvious, suspicions are reasonably raised in any instance where the leading spokesman and proponent of unionism is discharged shortly after the beginning of organizational efforts, as occurred here. But, with equal obviousness, it is frequently stated that such suspicion is, itself, an inadequate basis for finding the existence of discriminatory motivation. It is necessary to examine the entire picture shown by evidence of the facts and circumstances surrounding and employer's decision to terminate an employee in order to determine the employer's motivation in reaching that decision.

Here, one such prominent circumstance is the knowledge, or lack thereof, of Prestidge's union activities by Dr. Megdal at the time Dr. Megdal determined to fire Prestidge. Did Dr. Megdal know on December 31, 1979, that Prestidge had been in touch with a union during the preceding several weeks, and that Prestidge had succeeded in his efforts to have all or most of his fellow employees join with him in the organizational effort?

Dr. Megdal testified that he had no such knowledge. So did Dr. Orr. And the record will not directly support a finding that either man knew, with certainty, of Prestidge's activities before he was fired.

But it is also true that: (a) Dr. Megdal could have learned of the organizational effort by means of mail received from the N.L.R.B. possibly as early as December 28 or 31; (b) despite Benson's denial that she passed her knowledge of Prestidge's activity on to Dr. Megdal, Benson could have told Dr. Megdal of it anytime after Prestidge spoke to her about the matter in mid-December 1979; (c) Lynes, contrary to her denial, could likewise have passed word of Prestidge's activity on to Dr. Megdal; (d) whether the fact of Dr. Megdal's state of knowledge can be established one way or the other from the evidence, it may nevertheless be appropriate to impute such knowledge to him either because of the cer-

[9] Prestidge maintained that the list was missing from his workplace on December 31. Prestidge had assumed that Dr. Megdal or Dr. Orr had taken it for purposes of review. I credit his testimony in this respect since no other reason appears sufficient to account for his failure to remark upon or question its absence at some point in time earlier than his conversation with Dr. Megdal that afternoon.

[10] Prestidge testified at one point that he mentioned the problem of "remakes" to Dr. Megdal in the exit interview. At another point he testified that he did not. When asked about this testimony he responded that he failed to mention it to Dr. Megdal because they had been talking about a different time than that shown on "the list." Prestidge's testimony in this respect is not credited. I base this conclusion on the inherent improbability of the truth of such a course of events as well as his unconvincing demeanor at the trial. The effect of this lack of credibility will be seen *infra*.

[11] Nowhere has any claim been advanced that Dr. Megdal's actions with the gun were violative of the Act.

tain knowledge of supervisors Benson and Lynes or the so-called small plant doctrine. And, finally, one's view of the state of Dr. Megdal's knowledge of Prestidge's union activities may be altered by the evidence of a conversation between Dr. Megdal and Jeff Gallego, which occurred shortly after Dr. Megdal fired Prestidge.

Here the evidence shows that Prestidge and other employees sought to keep knowledge of their union organizational activities from Dr. Megdal. And, obviously, neither Benson nor Lynes was regarded by employees as a conduit of information to Dr. Megdal. Thus both Lynes and Benson were invited into the organizational effort. Benson was approached by Prestidge, himself, in mid-December 1979, but declined to participate in organizational activities in light of her position as a supervisor. She testified that she then went on vacation, not to return until after Prestidge's fate had been sealed, and that she never communicated her knowledge of Prestidge's activities to Dr. Megdal until after Prestidge's discharge. Similarly, Lynes' testimony was to the effect that she never passed on to Dr. Megdal any information about the union activities she observed. I have carefully considered the testimony of both these witnesses on this point, and have determined to credit this testimony. There is no direct evidence to contradict their testimony, and the circumstances of the case do not, in my view, warrant discrediting their testimony.

Because of my credibility findings on this issue, I believe this case is not controlled by the general rules requiring that knowledge possessed by a supervisor must be imputed to the Respondent's other management officials.

Additionally, I do not believe that this case is one for the application of the small-plant doctrine, for it was not demonstrated that union activities were carried on in such a way as to indicate that Dr. Megdal would have been likely to gain knowledge of them. To the contrary, it appears that the two potential "leaks" (Benson and Lynes) remained "compartmentalized."

In this connection, and notwithstanding the ease of modern electronic communication, I note that Dr. Megdal was away from the Respondent's clinic from the outset of the employees' union activities until he arrived at the clinic on Christmas Day 1979.

I cannot agree with the General Counsel's argument that the evidence shows that Dr. Megdal learned of the union activities of Prestidge or others, *before deciding to fire Prestidge or actually doing so*, by means of the correspondence mailed from the Board's Regional Office on December 26, 1979. While such a possibility exists, I will not substitute mere possibility for proof in the absence of surrounding circumstances tending more strongly to discredit Dr. Megdal's denial or knowledge before firing Prestidge.[12]

Instead, so Megdal testified, he first learned of Prestidge's union activities *after* Prestidge had been discharged, when Jeff Gallego came to him and, in effect, accused him of firing Prestidge because of such activities. While I regarded this story with some initial skepticism I have determined that both Dr. Megdal's incredulous response to the information implicitly imparted to him by Gallego's accusative probing. I find that Dr. Megdal's response was consistent with his claimed state of ignorance about Prestidge's union activities.

In sum, I find that none of the direct evidence of surrounding circumstances is sufficient herein to establish that Dr. Megdal either had or is chargeable with knowledge of the union activities of Prestidge before carrying out the discharge. Compare *Kimball Tire Co.*, 240 NLRB 343 (1979).

Even if I were to find that knowledge of Prestidge's activities existed in Dr. Megdal before Prestidge's discharge, there remains substantial reason to doubt that Prestidge was fired for discriminatory reasons, or upon basis of a pretext asserted in order to conceal a discriminatory motivation. Instead, I credit the testimony of Dr. Megdal to the effect that he had become concerned with a decline in the clinic's income and productivity, and that he came to believe that Prestidge's failure to operate the lab on a reasonably current basis lay at the bottom of at least a large portion of the problem. I find that such evidence has been buttressed by the testimony of Dr. Orr and Benson,[13] each of whom I find credible in this respect.

The General Counsel argues that much of the fault, if any, for Prestidge's poor productivity lies with the Respondent itself, and should excuse Prestidge's decline in productivity. For example, it is claimed that Prestidge had to devote a substantial portion of his time to repairing, modifying, or installing machinery. It is also claimed that Prestidge's worktime was impinged upon by having to run errands, such as occasionally going to the post office. And, finally, it is claimed that Prestidge's work was slowed by virtue of the supplies he was given to work with, which he alleged to be of inferior quality.

Prestidge's various claims of hindrances and obstacles to good productivity lacked credibility. While testifying, Prestidge showed a marked tendency to speak in conclusions and generalities. When pressed for details his testimony seemed inconsistent or implausible in some respects. For example, Prestidge made much of the difficulties he experienced as a result of being forced to work with an inferior grade of materials, such as gold.[14] Yet he excused the obvious inconsistency of his failure to mention this to Dr. Megdal in his "exit interview" by lamely pointing out that he and Dr. Megdal had been discussing computer records of his productivity for a different period of time[15] than that during which he experienced problems with material. Yet, only a few moments prior to offering this excuse he had testified that he expe-

[12] Even if I were to agree that the evidence supports an inference that such correspondence had been delivered to the clinic by the Postal Service, I see no warrant for the further finding that its contents were brought to Dr. Megdal's attention.

[13] Benson testified that Resp. Exh. 1 demonstrated the claimed slackening of dental business, and the Respondent now argues that the decline in revenue was due, at least in part, to Prestidge's poor record of productivity.

[14] The Respondent's documentary evidence demonstrated at the trial that its gold purchases throughout the period in question were uniformly of the same grade; i.e., Baker 444 gold.

[15] Dr. Megdal credibly testified that the information from records obtained by his phone call during Prestidge's exit interview covered not only most of December 1979, but November 1979 as well.

rienced problems with materials only days before being fired. Such an excuse seems implausible to me because Prestidge did not appear to be the sort to simply suffer in silence if faced with discharge over a matter as to which he possessed a valid excuse.

Similarly, I am unconvinced that Prestidge's working time was so severely impinged upon by other competing duties as he would have it. His trips to the post office doubtlessly occurred, but I am convinced that any such trip could have been completed easily in only a few minutes. Certainly they would have occupied no more than an hour of his time in any given week during November and/or December 1979. And while I do not doubt that Prestidge may have helped in attempts to install, modify, or repair certain equipment in the November-December 1979 timeframe, I am convinced that his claim that he lost approximately 8 to 9 days of work from his normal job duties is overblown. For the records maintained by the Respondent showed that the equipment was installed on November 21, 1979, by dental supply company; thus it was not installed by Prestidge, and it was already in place and, so far as is known, fully operable in later November and throughout December 1979.

Conclusion

The General Counsel's evidence has not persuaded me that the Respondent had culpable knowledge of Prestidge's union activities by the time of the decision to terminate Prestidge's services, or by the time of the termination itself. Moreover, I find that the General Counsel's evidence lacks the requisite credibility to persuade me that Prestidge's discharge was based on discriminatory considerations. Accordingly, I shall dismiss this portion of the complaint.

Conclusions of Law

1. Dr. Phillip Megdal, D.D.S. Inc., is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating and threatening an employee with respect to union activities of its employees.

4. Except as found above, the Respondent has not engaged in unfair labor practices, whether alleged in the complaint as written, or "amended into" the complaint during the course of the trial.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

Statement of the Case

FREDERICK C. HERZOG, Administrative Law Judge: On April 22, 1981, I issued my Decision in this matter. Thereafter, on July 16, 1982, the Board issued its Order Remanding to Administrative Law Judge, "for the purpose of reevaluating the evidence and making a credibility resolution concerning Lynes' testimony that she never told Dr. Megdal about the union activities she had observed."[1]

In its Order the Board pointed out that I credited the testimony of Supervisor Ronnea Lynes to the effect that she had never passed on to Dr. Megdal any information about the union activities she had observed. The Board noted that my credibility resolution was based on the circumstances of the case and the absence of any direct evidence to contradict Lynes' testimony. However, the Board further noted that employee Pegi Ford testified that Lynes informed her that she (Lynes) had given the names of everyone who signed union authorization cards to Dr. Megdal. Thus, the Board concluded that Ford's testimony was in direct conflict with that of Lynes and that I had "failed to consider all the relevant evidence bearing on the critical question of Lynes' credibility."

Findings of Fact

It is true that I failed to set this conflict out in the factual recitation contained in my Decision, and it is equally true that I failed to resolve the seeming conflict. However, my failure came about because I saw no necessity for doing so, as I explain hereafter.

Pegi Ford testified that she attended a meeting of employees at the Copper Kitchen between the Christmas and New Year's vacation. Ronnea Lynes was among those present as Carl Prestidge explained unionism to the employees and answered their questions. Ford was asked what was said at the meeting. She responded, in part, "At that meeting the whole office was aware that Dr. Megdal and Pam [Benson][2] and everybody knew about the meeting." An objection to the witness' testimony concerning her impressions of other employees' thoughts was sustained, but she was allowed to continue her recitation of events in her own words. Ford then stated that an employee asked whether or not they were going to lose their jobs on account of the Union, and went on to explain that Lynes was very, very upset, evidently because she (Ford) had earlier asked Lynes why she had let Dr. Megdal know the names of employees involved in the organizational effort.

Ford was then asked if she had talked with Lynes about whether "anyone from Dr. Megdal's office knew about the union activity." The Respondent's counsel objected on the grounds of relevance and hearsay.[3] Before I made my ruling counsel for the General Counsel stated: "Your Honor, I am not attempting to establish through this witness the fact that the statement was made. I agree that testimony would have to come from Ronnie [sic] Lynes herself."

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[1] The General Counsel's motion to quash, in which he asserts that I may not consider the arguments advanced in the Respondent's memorandum of law that I affirm my original Decision, is hereby denied. Despite the absence in the Board's Rules and Regulations of explicit authority for submission of such arguments I conclude that, by its submission, the Respondent did not engage in improper *ex parte* communication with me. I found the materials sent to me to be confined to cogent comment and argument concerning the merits of my original Decision's credibility resolutions.

[2] Bracketed material added for the sake of clarity.

[3] It must be remembered that to this point in the trial Lynes had not testified and the General Counsel had not yet become aware of her status as a supervisor. Obviously neither had I.

Upon my inquiry into the purpose of the question counsel for the General Counsel responded, "She [Ford] testified to the basis of their apprehension at this meeting."

At that, I ruled that I would overrule the objection in order to secure the context of the testimony concerning the meeting.

Ford then testified that, some time between Christmas and New Year's vacation, in a hallway at Dr. Megdal's office, Lynes came down the hall and said, "I blew it. I'm sorry. I gave Dr. Megdal the names of everyone who signed the cards. I feel terrible."

At that point I inquired of counsel for the General Counsel how the testimony he had just elicited related to the topic I had permitted him to inquire into, i.e., the context of the meeting at the Copper Kitchen. He responded, in essence, by pointing out that the employees' apprehensive state of mind now made sense. I then noted that I failed to understand why it had been necessary to go further and secure hearsay testimony regarding Lynes,[4] and, when I started to offer assurances to the Respondent's counsel that the testimony would not be used improperly to bind the Respondent, counsel for the General Counsel interrupted me and stated, "I recognize that it is not binding on [the R]espondent. I did not intend it for that purpose."

Based on counsel for the General Counsel's statements, I deemed it crystal clear that Ford's testimony on this point had been admitted into evidence over the objection of the Respondent *only* for an extremely narrow purpose, i.e., to show the context of the meeting.

The General Counsel's next witness, Stacey Jencks, was also asked by counsel for the General Counsel what was said at the meeting, evidently the same one referred to by Ford. When Jencks began to testify about what had been said by Lynes, and Lynes' emotional state, the Respondent's counsel interposed a hearsay objection. Referring to the testimony of Ford, minutes previously, I sustained the objection.

Counsel for the General Counsel's next witness was Lynes. Lynes responded to counsel for the General Counsel's questions, as follows:

> Q. Now, did Dr. Megdal ever ask you about what was on this sheet? Did you ever tell him what this sheet showed?
>
> A. After he was notified of the union at a later date I believe I did tell him.
>
> Q. After he was notified of the union?
>
> A. Yes. It was weeks after that in talking to him. I did see him and told him what the results it were.
>
> JUDGE HERZOG: What was what?
>
> THE WITNESS: What the results of it were. According to that I told him what was done and what the sheet showed. It was weeks after.
>
> JUDGE HERZOG: Weeks after what?
>
> THE WITNESS: After Carl was gone.
>
> Q. (By Mr. Stratton) Weeks after his discharge?
>
> A. Yes.
>
> Q. He didn't ask prior to his discharge what this sheet had shown?
>
> A. I don't believe so.
>
> Q. Now, did you ever have a conversation with Dr. Megdal regarding your union activity or any union activities?
>
> A. He had asked me if I had signed the card.
>
> Q. When was that?
>
> A. The first week in January.
>
> Q. What did he say? Exactly what did he say?
>
> A. "Did you sign a card?"
>
> Q. What did you reply?
>
> A. Yes, I did.
>
> Q. Was there any other conversation?
>
> A. No. He said, "Oh, lovely" underneath his breath, not directed to me. Then I left the room.
>
> Q. Was there any conversation between yourself and Dr. Megdal regarding union activities?
>
> A. I believe he asked me what was so terrible that the employees felt like they had to bring a union in there.
>
> Q. When was that?
>
> A. It was the end, at the end, probably the second week in January.
>
> Q. This was after he asked you about whether or not you signed a card?
>
> A. Yes.
>
> Q. Did you ever have any conversation with Dr. Megdal about union activities prior to the time he asked you if you signed the card?
>
> A. No.
>
> Q. None whatsoever?
>
> A. No.
>
> Q. He didn't ask you who attended union meetings?
>
> A. No.
>
> Q. He didn't ask you what other employees signed cards?
>
> A. No.
>
> Q. He didn't ask you if Prestidge was the leader of the union activities?
>
> A. No.
>
> Q. Did you ever tell Pegi Ford that Dr. Megdal had asked you about union activities?
>
> A. I don't believe so, no.
>
> Q. You don't believe so or can you state did you or did you not tell her that Dr. Megdal had asked you about union activities?
>
> A. No.
>
> Q. Did you ever tell Stacey Jencks that Dr. Megdal had asked you about union activities?
>
> A. No.
>
> Q. In the investigation of this case were you interviewed by a Board agent, someone from the National Labor Relations Board?
>
> A. Yes.
>
> Q. Did you give a statement?
>
> A. Yes.
>
> Q. A signed statement?
>
> A. No.

[4] Who was not yet known to be a supervisor, or even claimed to be by counsel for the General Counsel.

Q. Did he write down what you said and you read it and signed it?
A. No.
Q. Did you refuse to do that?
A. No.
MR. STRATTON: I have nothing further.

It was only in the course of Lynes' cross-examination that certain of the questions posed by the Respondent's counsel raised the question in my mind that Lynes might be a supervisor. I asked if he was so contending. He responded that he was not. Further discussion between all counsel and me led me to ask for the General Counsel's position. Counsel for the General Counsel responded, as follows: "General Counsel was unable to interview this witness. I really don't know whether she is a supervisor or not."

Thereafter, on redirect examination of Lynes by counsel for the General Counsel, she was asked about her authority as a supervisor, all of which she readily confessed. During the course of counsel for the General Counsel's redirect examination I granted him permission to cross-examine Lynes, specifically upon the issue, among others, of whether she had been a conduit of knowledge to Dr. Megdal. Counsel for the General Counsel asked no questions of Lynes thereafter concerning the issue of whether she had conveyed knowledge of Prestidge's union activities to Dr. Megdal.

At no time did counsel for the General Counsel seek to reexamine witnesses Ford or Jencks. Nor did he ask me to change any of my rulings upon the evidence in this case.

Conclusions

It is clear that had I been aware that Lynes was a supervisor (or even that the General Counsel so contended) I would not have sustained the objections of the Respondent's counsel to questions posed to Ford and Jencks. Nor would I have so plainly reassured the Respondent's counsel regarding the uses to be made of such evidence. But I had no such knowledge when I made my rulings. And I felt reinforced in offering such reassurances to the Respondent's counsel given the position taken by counsel for the General Counsel at all relevant times.

Thus, as the Board says, it is true that I failed to consider Ford's testimony that Lynes had informed her that she had given Dr. Megdal the names of card signers when I determined to credit Lynes' testimony that she had not passed on information to Dr. Megdal. I failed to "consider" this evidence because, based on the assurances of counsel for the General Counsel, I had, as set forth above, expressly assured the Respondent that I would consider such evidence *only* to provide a context to the meeting being inquired about. More specifically, I relied upon counsel for the General Counsel's statement that "I recognize that it is not binding on respondent. I did not intend it for that purpose." I am compelled to adhere to my initial decision and credibility resolutions.

In my opinion there is no competent evidence in this record by which Ford may be held to have contradicted Lynes' denial. In retrospect I recognize that I should have fully explained my reasons for ignoring the testimony of Ford on this point, rather than relying on the sense of the record to make it clear.

Nevertheless, I do not believe it would have been proper for me to have utilized the testimony of Ford in a manner so inconsistent with the limitations placed upon it at the trial, notwithstanding the change in circumstances which occurred at a later point in the trial when Lynes was discovered to have supervisory authority. As stated earlier, at no point was I asked to reconsider or reverse my rulings. At no time did counsel for the General Counsel seek to recall witnesses, or otherwise indicate that a change in my rulings was being sought.

Under all the circumstances I conclude that I must reaffirm my original Decision, for the reasons stated therein.

The General Counsel's evidence has not persuaded me that the Respondent had culpable knowledge of Prestidge's union activities by the time of the decision to terminate Prestidge's services, or by the time of the termination itself. Moreover, I find that the General Counsel's evidence lacks the requisite credibility to persuade me that Prestidge's discharge was based on discriminatory considerations. Accordingly, I shall dismiss this portion of the complaint.

CONCLUSIONS OF LAW

1. Dr. Phillip Megdal, D.D.S., Inc., is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by interrogating and threatening an employee with respect to union activities of its employees.

4. Except as found above, the Respondent has not engaged in unfair labor practices, whether alleged in the complaint as written, or "amended into" the complaint during the course of the trial.

[Recommended Order omitted from publication.]